No. 5726

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
JAMESON & MEYERS,
Bankrupts.

PAULEY OIL COMPANY,
Appellant,
vs.

E. A. LYNCH, Trustee in Bankruptcy of the Estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of Jameson & Meyers, and under the fictitious name of Eagle Gasoline Company,
Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Introduction.

The claim of appellant against the Estate of Jameson & Meyers, Bankrupts, was disallowed after a hearing before the referee, Earl E. Moss, Esq., upon the ground that appellant had received a preference to the extent of $9100.00 which it had failed and refused to surrender.

Appellant, we believe, concedes that in connection with the payment and receipt of said sum, all of the elements of a preference existed, with one exception, namely, did appellant have actual knowledge or reasonable cause to believe that the payments received would effect a preference?

The issues stated by counsel for appellant are as follows:

1. Did appellant at the times it received the said eleven payments, or any of them, have actual knowledge that thereby a preference would be effected? or

2. If appellant did not then have such actual knowledge, did it then have reasonable cause to believe that thereby a preference would be effected?

The referee found that appellant "received said payments of $9100.00 and each of them knowing, or having reasonable cause to believe, that it was receiving a preference under the provisions of the bankruptcy act." (Tr., p. 41.)

Appellant contends that such finding is not supported by the evidence. Appellee concedes a conflict in the testimony, but such conflict has been resolved in favor of appellee.

II.

Argument.

Appellant draws attention to the fact that one of the bankrupts, Robert F. Meyers, occupied an office of the Triangle Service Stations and that the officers of appel-

lant corporation believed that such stations were owned by the bankrupt, Robert F. Meyers, and did not know that the same were owned by Rosabel Meyers, the wife of bankrupt. In this respect, however, there is a conflict as shown by the testimony of Mr. Meyers as follows:

> "I never told Mr. Pauley that I was the owner of the Triangle Service Stations; I told him what stations I and the partnership of Jameson & Meyers did own or operate at the time I met him at 1100 Sunset Boulevard, the only time I met him up there. That was a couple of weeks after the contract was signed. He had nothing to do with us before. The general conversation was started through Jameson, he did not like Jameson, he said, on account of Jameson's connections with his partner in the Vernon Oil Company, and he looked to me to watch Jameson. He said, 'What are you boys after?' I said, 'after a lot of city and county and state gas contracts,' and I said, 'I have 10 or 11 stations now, and if I can get Mrs. Meyers to see the light I can supply Mrs. Meyers with gas for her stations.' Mr. Pauley said he would look to me, but he didn't want anything to do with Mr. Jameson." (Tr., p. 108.)

Robert F. Meyers further testified concerning the signs in and upon the building occupied by him. Such testimony is as follows:

> "I am familiar with the signs that are displayed at the Triangle Service Station at 1100 Sunset Boulevard, Los Angeles, California, and have been familiar with the sign displayed there ever since the station has been there, 15 years. The sign on the plate glass with a triangle reads, 'Triangle Super Service Station, Rosabel Meyers, Sole Owner;' on the office door as you walk into the office door is a sign that reads, 'Triangle Service Station, Rosabel

> Meyers, Sole Owner;' in the window there is a sign which bears only 'Mrs. Meyers Service Station,' relating to any unsatisfactory service for the people that have any complaint to call up the telephone number and notify the owner of the station and signed, 'Rosabel Meyers, Sole Owner;' on the top of the building, until the Calpet took the building, was a sign about 40 feet long and 12 feet high which advertises tires and batteries and all; 'Triangle Service Station, Rosabel Meyers, Sole Owner,' on all her stations. The large sign has been there perhaps 10 or 12 years. At the time Mr. Sohus was making his visits it read 'Triangle Super Service, Main Office, Rosabel Meyers, Sole Owner. Tire Bargains, Battery Recharging, Ignition and Generator Work'." (Tr., pp. 106-107.)

It is conceded that the payment of the amount involved in this transaction continued over a period of approximately two months; from October 27, 1925, to December 26, 1925. We contend that the evidence establishes the fact that such payments were made under pressure from the Pauley Oil Company and under circumstances that would leave no doubt in the mind of a reasonable, prudent business man that the bankrupts were insolvent and that the receipt of such money would effect a preference. We quote the following testimony of Robt. F. Meyers in support of our contention:

> "This sum of $9,000 was paid in several checks. The first payment was made October 27, 1925. The last payment that went to make up that $9,000 was paid December 2, 1925. The amounts of each payment and the date each payment was made are: November 16, $1500; November 4, $500; November 10, $500; November 21, $500; November 25, $2500; October 27, $500; October 31, $500; December 2, $2500. I gave them the checks personally. Those checks were not all drawn upon the same

account. $7,000 of them were drawn on the Triangle account, on Triangle checks, and $2,000 on Jameson & Meyers account and Jameson & Meyers checks. The amounts paid on Jameson & Meyers checks were: October 27, $500; October 31, $500; November 4, $500; and November 10, $500. The payments handled with Triangle checks were so handled because at the time being Jameson & Meyers did not have any money, and this man was insistent and did not care where it came from, so I gave it out of Mrs. Meyers' account, and when we got it in I saw that Mrs. Meyers got it back in her account. There was lots of it that never went back. These checks were delivered by me personally to Mr. Sohus. Every morning I would go there I would find Mr. Sohus waiting there. I told him we were in trouble, and he knew we were in trouble. He had attended a meeting before that and had agreed to give me 6 months' time to get the firm out of bankruptcy, and I said, 'On top of that you are saying here every morning and telling me you don't care where I get it or what the condition of the business is as long as you get yours.' I do not recall the approximate amount the Pauley Oil Company claimed on October 27, 1925; I think we owed them about $25,000, I am not sure. We did not buy any merchandise or incur any further indebtedness to the Pauley Oil Company between the dates of October 27, 1925, and the date of the filing of the petition in bankruptcy, nor for some time before that either. We asked for credit from the Pauley Oil Company in the period from October 27, 1925, and subsequent to that date. I asked such credit from Mr. Sohus. I just can not tell the exact dates, but they would not give us any goods. Mr. Devere was there at all times. I asked Mr. Sohus if he would give us some gas so we could keep on moving and in that way work it out that way, and he said, 'Nothing doing'." (Tr., pp. 68-69.)

The non-payment by bankrupts of the trade acceptance

given to appellant on or about September 21, 1925, and the investigation by appellant at the time said trade acceptance became due and dishonored, was sufficient, in our opinion, to cause a prudent man to question the solvency of the bankrupts. We quote from the testimony of Mr. Pauley:

> "He said he could not get the cash until Mr. Stewart returned several times. I remember him saying it on that day. I think he volunteered the information that Mr. Stewart was in New York. I asked when Mr. Stewart would be back, and he said in 10 days, I think. I did not object to making the trade acceptance for 30 days rather than for 10 days, until Mr. Stewart got back. That concluded the conversation at that time, the 20th of September. I don't recall whether I saw Mr. Meyers at any time between that and the 20th of October. When the trade acceptance was not paid, I had a conversation with Mr. Meyers. That was about the 21st or 22nd of October. That conversation took place at the Sunset and Beaudry office. Mr. Devere, Mr. Meyers, Mr. Sohus and myself were present. We asked him why he did not pay the trade acceptance, that our bank had told us it was unpaid, and he said that Mr. Stewart had not yet returned from the East, and that he was unable to secure any funds from anyone else. We asked him then if he had collected from the Los Angeles Gas & Electric Corporation, and he evaded the answer to that. I don't recall that he did not answer at all, but it was not a satisfactory answer. When I first demanded payment on the date of the trade acceptance, September 21, he told us that he had not got his pay from the Los Angeles Gas & Electric Corporation on that day that he gave the trade acceptance. Our records show that the last shipment was in August, and he said their records showed it was partly delivered in September, at their siding in September. Then we took a trade acceptance for 30 days, due October 21. When that was

due and not paid, that is the time that he stated he was getting the money from the Farmers & Merchants National Bank and that Mr. Stewart was away. He said Mr. Stewart would return in 10 days, if I remember correctly, some time about that. We asked him why he had not paid the trade acceptance at the bank when it was presented and he said he went to the bank to secure the funds and found that Mr. Stewart was away, was in New York, and that he had only dealt with Mr. Stewart, and that as soon as he returned he would borrow the money from him. The next move we made in that matter, if I remember correctly, we waited until Mr. Stewart returned. I don't recall when that was. I had a conversation with Mr. Meyers after Mr. Stewart returned. I don't recall the date of that conversation, and I am only reciting the dates there by the exhibits, but as soon as he returned we had a conversation with Mr. Meyers. It was some time in October. We had called up the bank and found out that Mr. Stewart had returned, and then we went up to see Mr. Meyers and told him we understood Mr. Stewart had returned and asked him if he had secured the money and he said he was sorry, that he was unable to do it, that he had a talk with Mr. Stewart and was unable to borrow any more money." (Tr., pp. 89-90.)

From the foregoing testimony of Mr. Pauley it is apparent that Mr. Pauley learned from said conversations: (a) that Mr. Meyers could borrow no more money from his bank; (b) that he was unable to secure any funds from anyone else, and (c) the answers from Meyers to questions touching upon collections were evasive, and unsatisfactory to Pauley.

Further, we wish to call the attention of the Court to the testimony of Mr. Sohus, secretary of the Pauley Oil Company:

"They said they had to wait for their collections before they could pay us. I would get in touch with them every three or four days, and ask how collections were. They might say that they could give me a check today or they might say, 'I won't have any more for a week or 10 days,' or 'Call me up in a week or 10 days.' That is the way the matter was handled.

"At the time we got the trade acceptance the account was around $40,000, including the trade acceptance.

"They would say, 'I am sorry, but that is the best we can do,' or 'I have money coming from this party or that party, or money coming from the city or this fellow has not paid his account or that fellow has not paid his account, and that is all I can give you.' And I believed that is all they could give me." (Tr., p. 103.)

From the above testimony of Mr. Sohus it may reasonably be inferred that he (Mr. Sohus) was bringing considerable pressure to bear on bankrupts in the matter of payment; was in touch with bankrupts every three or four days, inquiring about collections, and when we take into consideration that the indebtedness of bankrupts to appellant at that time was approximately $40,000.00, and that the credit officer of appellant believed that amounts ranging from $500.00 to $2500.00 represented bankrupts' ability to pay, we submit that such belief was sufficient to cause appellant to know that the bankrupts were insolvent, and that the payments made by bankrupts would constitute a preference. In this connection, we wish to quote further from the testimony of Mr. Meyers:

"I had a conversation with Mr. Pauley where the matter of my solvency or insolvency was discussed. That was a conversation that I forgot

about yesterday. It was after that trade acceptance was given to him and after it came back; right after it came back. The conversation took place at the Independent Petroleum Refiners Association, or something of that kind, and we met Mr. Tapper and Mr. McCullough, and I met Mr. Pauley up there. Mr. Pauley and somebody that represented that association—I don't remember his name—were present. Mr. Pauley was excited, said, 'You ought not to have given this trade acceptance unless you thought you were going to take care of it,' and I told him that I gave him the trade acceptance because Mr. Sohus asked for it and wanted to use it to get money, and that Mr. Sohus at that time did not think I would be able to take care of it because he knew we were pushed all around to get by, and the man that was there at the time said, 'There is no use arguing with these fellows. These fellows were broke and you knew they were broke at the time. Why didn't you stall along with them?' Almost ended in a murder or something on the top floor going to kill someone." (Tr., p. 107.)

Mr. Sohus, secretary of appellant corporation, testified to a conversation he had with a Mr. Dahl, credit manager of the Shell Oil Company, regarding the credit of bankrupts, which conversation took place in October, 1925. We quote from such testimony:

"Mr. Dahl of the Shell called me regarding the credit of Mr. Meyers a few days after we suspended the contract. That was in October. I told him the amount owing us, how much was past due and how much was not yet due, and how he had made his payments. I don't know when I talked to Mr. Dahl again or anybody connected with the Shell. I talked with Mr. Dahl about every week. I had occasion to call him for something or he had occasion to call me for something about every week." (Tr., p. 104.)

The testimony of Mr. Meyers regarding the apparent

effect upon Mr. Dahl of this conversation between Mr. Sohus and Mr. Dahl is enlightening. We quote:

> "Our purchases from the Shell during this time from the 27th of October, 1925, to the time of bankruptcy—we had a few days there when Mr.—I don't know the credit man's name, called me up and said he just had a conversation with Mr. Sohus, who said we were into them for $40,000 and said we would have to pay cash, and they would not even take a check. They gave me no credit thereafter. We had to send down money; not even checks after that." (Tr., p. 108.)

On the question as to the character or degree of knowledge required on the part of one receiving payments from alleged bankrupts we quote from the case of *Merchants National Bank of Cincinnati vs. Theo. Cook et al.*, 95 U. S. 24 Law Ed., page 412—quotation from page 414:

> "It is scarcely necessary to discuss the authorities as to the meaning of the words 'having reasonable cause to believe the party to be insolvent.' When the conditions of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe."

And further, we quote from *Black on Bankruptcy*, 4th Ed., pp. 1310-1311:

> "But it is important to notice that the statute does not require that the preferred creditor should have any actual knowledge on the subject of a debtor's insolvency or the result of the transaction in giving a preference, nor even that he should have

> any actual belief on that point. What he really thinks or believes is entirely immaterial. What the law requires is 'reasonable cause to believe,' and if this exists it is enough without regard to the actual state of the creditor's mind or opinion."

We respectfully submit that the quotations from the testimony herein contained sufficiently support the finding of the referee upon the issue involved in this case. We submit that such testimony discloses many facts which tended to show that the true financial condition of bankrupts was brought directly to the attention of the officers of appellant. On this point we wish to quote from *Re Campion, et al.,* 256 Fed. 902-6:

> "Mr. Klein was informed of unpaid mortgages and of unpaid judgments recently obtained and docketed, and of the absence of money wherewith to pay, and of credit wherewith to obtain money, and of lack of credit at the bank, as the Klein Company then held unpaid and dishonored checks of Campion & Sons. This last fact alone would not give reasonable cause to believe necessarily, but in the instant case it was one of several facts of which Klein was informed, all pointing to actual insolvency. 'One swallow does not make a summer,' but when we see the sky full of swallows homeward flying, and are not aware of the season of the year, we well may inquire, 'Is not summer here?'
>
> "This case presented a question of fact for the decision of the referee, and his finding and decision should not be disturbed, as it is sustained by the evidence. He saw the witnesses and heard them give their testimony. He, far better than the Court is, was able to judge what the facts were, as to the transaction of October 18th."

And further, the case of *Benjamin v. Buell,* 268 Fed. 792-4:

"That the bankrupt was at that time, and for a very considerable time before, insolvent, is, we believe, sufficiently shown by the evidence. Whether appellant knew, or had cause to believe, that the bankrupt was then insolvent, and that the payment would constitute a preference, is dependent upon conflicting evidence, and facts and circumstances which the evidence disclosed. From appellant's long course of dealings with the bankrupt, and his financial interest in him through being so long his creditor, coupled with his frequent presence at bankrupt's place of business, and conversations concerning his affairs, and opportunity for intimate knowledge of them, we cannot say that the chancellor, who heard and saw the witnesses, was not justified in the conclusion he must of necessity have reached, to support the decree, that at and before time of the payment appellant was aware of the bankrupt's insolvency, and of his very desperate financial straits, and of the large excess of liabilities over assets which the undisputed evidence seems to establish. This being so, so much of the decree as is predicated upon this $1,400 payment to appellant by the bankrupt is justified and should remain undisturbed."

III.

Conclusion.

We, therefore, respectfully submit that the evidence was entirely sufficient to sustain the finding of the referee; that appellant knew or had reasonable cause to believe that a preference would be effected by the said payments made by bankrupts and received by appellant.

Since there is sufficient evidence to sustain the finding of the referee in this respect, such finding should not be disturbed, even though there is evidence that might tend to support an adverse finding. The order of the

referee and the order of Honorable William P. James, approving and confirming the referee's order, should be affirmed.

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